TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~464.~~ 179

THE CITY OF SACRAMENTO, PLAINTIFF IN ERROR,

vs.

PAULINA C. FOWLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED AUGUST 8, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 464.

THE CITY OF SACRAMENTO, PLAINTIFF IN ERROR,

vs.

PAULINA C. FOWLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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a UNITED STATES OF AMERICA, *ss:*

To Paulina C. Fowle, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1873, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of California, in the ninth judicial circuit, wherein the City of Sacramento is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 10th day of April, A. D. 1873, and of the Independence of the United States the ninety-seventh.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

b Service of a copy of the within citation, (certified,) this day admitted.

WINANS & BELKNAP,
Attorneys for Paulina C. Fowle, Def't in Error.

SAN FRANCISCO, *April 10th*, 1873.

(Endorsed:) 1035. United States Supreme Court. The City of Sacramento vs. Paulina C. Fowle. Citation. Filed 11th April, 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, in the ninth judicial circuit, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Paulina C. Fowle, plaintiff, and the City of Sacramento, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October (J. F. O'B., D. C.,) next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United Utates should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 10th day of April, (J. F .O'B., dep. cl'k,)

in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] Attest, &c.: L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Cl'k.*

d The answer of the judges of the circuit court of the United States for the district of California, in the ninth judicial circuit.

The record and all proceedings of the plaint. whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Cl'k.*

(Endorsed:) 1035. United States Supreme Court. The City of Sacramento, pl'ff in error, vs. Paulina C. Fowle, def't in error. Writ of error. Filed April 11th, A. D. 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

1 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States of the ninth circuit, in and for the district of California.

PAULINA C. FOWLE, PLAINTIFF,
vs.
THE CITY OF SACRAMENTO, DEFENDANT.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city of San Francisco.

The President of the United States of America, greeting, to the city of Sacramento, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county, or, if served out of this county, then within forty days, or judgment by default will be taken against you.

2 The said action is brought to recover from you the sum of $40,100.64, with interest thereon at the rate of 8 per cent. per annum from March 8, 1871, until paid, and $16.50 costs, being money alleged to be due on a certain judgment alleged to have been recovered against you on the 26th of March, 1867, in the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco, and costs of this suit, as will more fully appear by reference to the original complaint on file herein; and if you

fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you, and each of you.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 26th day of March, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth.

[L. S.] LORENZO S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clk.*

(Endorsed:)

U. S. MARSHAL'S OFFICE, DISTRICT OF CALIFORNIA.

I hereby certify that I served the within summons on the City of Sacramento, by delivering a certified copy of the same, together with a copy of the complaint, to Chris. Green, president of the board of trustees of said county, in the presence of the said board of trustees, and while said board of trustees was in session at Sacramento, California, on the 15th day of April, A. D. 1872.

W'M GOUVENEUR MORRIS,
U. S. Marshal.
By ALLEN TILLINGHAST, *D. M.*

F. P. Dann, esq., plaintiff's attorney. Filed 17th April, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

4 *Complaint.*

DISTRICT OF CALIFORNIA, *ss:*

In the circuit court of the United States, ninth circuit, and district of California.

PAULINA C. FOWLE, COMPLAINANT,
v.
THE CITY OF SACRAMENTO, DEFENDANT.

DISTRICT OF CALIFORNIA, *ss:*

Paulina C. Fowle, a citizen of the United States of America, and a resident of the State of Massachusetts, plaintiff in this suit, by F. P. Dann, her attorney, complains ot the City of Sacramento, a municipal corporation formed and existing under and by virtue of the laws of the State of California, and existing and exercising its functions as such corporation in the State of California, and within the district of California, defendant, and for cause of action alleges:

That, on the 26th day of March, 1867, at the city and county of San Francisco, and State of California, in the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, in an action therein pending, wherein this complainant was plaintiff, and the defendant herein was defendant, judgment was duly made and entered in favor of said plaintiff, whereby it was duly adjudged by said court, that the defendant should pay to
5 said plaintiff the sum of ($40,100.64) forty thousand one hundred $\frac{64}{100}$ dollars, with interest thereon from the 8th day of March, 1867, at the rate of eight (8) per cent. per annum, together with the costs of the suit in said action, amounting to $16.50; that no part thereof

has been paid; that the said judgment has been presented to the said defendant and to the board of trustees of said defendant, the City of Sacramento, by the plaintiff, and payment of the amount due thereon, principal, interest, and costs as aforesaid, has been demanded by the plaintiff of said defendant, and of said board of trustees, but said defendant and said board of trustees have rejected the same, and the whole thereof, and have refused, and still do refuse, to pay the same, or any part thereof.

That the plaintiff has presented the said judgment as a claim and demand against the defendant, to the defendant, and to the board of trustees thereof, and has demanded that the same be audited and allowed as a claim and demand against the defendant for the said sum due thereon, to wit, the said principal, interest, and costs as aforesaid, but the said defendant, and the said board of trustees, have rejected the said judgment claim and demand, and the whole thereof, and have refused, and still do refuse, to allow or audit the same, or any part thereof.

Wherefore the complainant prays judgment against said defendant for said sum of $40,100.64, with interest thereon at the rate of eight (8) per cent. per annum from said 8th day of March, 1867, until paid, and costs of said suit, amounting to $16.50, and for costs of this suit.

F. P. DANN,
Attorney for Complainant.

6 (Endorsed:) Filed 26th March, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

7 *Answer.*

In the circuit court of the United States, ninth circuit, and district of California.

PAULINE C. FOWLE, PLAINTIFF,
v.
THE CITY OF SACRAMENTO, DEFENDANT.

The defendant, by its attorneys, McKune and Welty, answers and denies all and singular the allegations in said complaint contained.

And, further answering the allegations in said complaint, defendant avers that there is not any record of the said supposed judgment and recovery, as the said plaintiff in her complaint has alleged, or otherwise.

And for a further and separate defense in this behalf, the said defendant sets up and alleges that it had no notice of the pendency of the said case in the said district court of the 12th judical district before or after the entry of said supposed judgment; that no process at any time therein was served upon it, and that it never appeared in said case in said last-mentioned action by attorney or otherwise.

And for a further answer and separate defense herein, this defendant alleges that in the said supposed judgment was included and wrongfully entered as a part thereof, by the clerk of the said district
8 court of the 12th judicial district, certain sums and amounts not authorized by law, or the pleadings in said cause, that is to say, interest at the rate of 8 per cent. per annum instead of 7 per cent. per annum, $3,000; interest on coupons which did not bear interest, $4,000; also a further sum of $2,000 for interest pretended to have accrued after the commencement of the action wherein said supposed judgment was entered as aforesaid, and before entry thereof, all of which said items were and are illegal and void.

And for a further answer and separate defense herein, defendant avers, sets up, and alleges that, at the date of the commencement of the said action in said 12th district court, it was, ever since has been, and still is, a municipal corporation, with powers, duties, rights, and liabilities, as provided in the act of the legislature of the State of California, entitled "An act to incorporate the city of Sacramento," approved April 25, 1863. That by and in said act of incorporation it is provided that no action shall be maintained against this defendant, upon any bond, covenant, agreement, contract, matter, or thing made or entered into before said 25th day of April, 1863, and this defendant avers that the said pretended cause of action accrued before and not after said last mentioned date. That said judgment, at the time of the entry thereof, was, ever since has been, and now is, void and of no effect.

Wherefore defendant demands judgment that it go hence without day, and have and recover of plaintiff, its costs, and that it have such other, further, or different relief as it may show itself entitled to, at the trial.

McKUNE AND WELTY,
Att'ys for Def't.

9 We certify that, in our opinion, the foregoing answer is well founded in point of law.

Sacramento, July 13, 1873.

McKUNE AND WELTY,
Attorneys for Def't.

Service accepted this 15th day of July, 1872.

F. P. DANN,
Att'y & Solicitor for Pl'ff.

Filed 15 July, 1872.

L. S. B. SAWYER, *Clerk.*

10 *Findings.*

United States circuit court, ninth judicial circuit, district, of California.

PAULINA C. FOWLE
v.
THE CITY OF SACRAMENTO. } No. 1035.

This cause having been tried by the court, without the intervention of a jury, on the eleventh and twelfth days of December, A. D. 1872, a trial by jury having been waived by the parties by a stipulation in writing duly filed with the clerk of said court; Joseph W. Winans, esquire, appearing on behalf of the plaintiff, and John H. McKune, esquire, on behalf of defendant; and the evidence introduced in this cause and the arguments of the respective counsel having been heard and duly considered, and the court being sufficiently advised, now finds the issues in favor of the plaintiff, and that plaintiff is entitled to judgment.

It is therefore ordered that judgment be entered in favor of the plaintiff for the sum of forty thousand one hundred $\frac{64}{100}$ ($40,100.64) dollars, together with interest on said sum, at the rate of eight per cent. per annum, from March 8, A. D. 1867, to the date of this finding, amounting to the sum of eighteen thousand nine hundred eighty $\frac{96}{100}$ ($18,980.96)

dollars, and together with the further sum of sixteen $\frac{50}{100}$ ($16.50) dollars costs adjudged to be due on entry of judgment in the district court
11 of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, March 26, A. D. 1867, in an action then pending in said court between the parties hereto, said sums amounting in the aggregate to the sum of fifty-nine thousand ninety-eight $\frac{10}{100}$ dollars, and also the costs of this action.

February 8, A. D. 1873.

(S'g'd) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

(Endorsed:) Filed 8th Feb'ry, 1873. L. S. B. Sawyer, clerk, by J. F O'Beirne, dep. cl'k.

12 *Judgment.*

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

PAULINA C. FOWLE
v.
THE CITY OF SACRAMENTO. } No. 1035.

This cause having, on the 1st day of December, A. D. 1872, being a day in the October term, A. D. 1872, of said court, come on regularly for trial before the court sitting without a jury, a trial by jury having been expressly waived by counsel for the respective parties, J. W. Winans, esq., appearing on behalf of plaintiff, and J. H. McKune, esq., on behalf of defendant, and the trial having been proceeded with on the 13th day of December, and the evidence for the respective parties having been introduced and closed, and the cause, after arguments of counsel, having been submitted to the court for consideration and decision, and the court, after due deliberation, having, on the 3d day of February, A. D. 1873, being a day in the February term, A. D. 1873, of said court, ordered that judgment be entered herein in favor of plaintiff in accordance with its finding, in writing, to be filed, which finding was, on the 8th day of said February duly filed: Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that Paulina C. Fowle, plaintiff, do have and recover of and from the city of Sacramento, defendant, the sum of fifty-nine thousand and ninety-eight $\frac{10}{100}$ dol-
13 lars, and her costs in this behalf expended, taxed at eighty-one $\frac{30}{100}$ dollars.

Judgment entered the 8th day of February, A. D. 1873.

L. S. B. SAWYER, *Clerk.*

A true copy of the judgment entered in the therein-entitled cause in judgment-register C. L., No. 1, page 575.

Attest.

[L. S.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 8th February, 1873.

L. S. B. SAWYER, *Clerk.*

14 *Certificate to judgment-roll.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit in and for the district of California,

do hereby certify that the foregoing papers attached together constitute the judgment-roll in the therein-entitled cause.

Attest my hand and the seal of said circuit court, this 7th day of March, A. D. 1873.

[L. S.]

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Judgment-roll. Filed 7th March, 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

15 *Substitution of attorney for pl'ff.*

U. S. circuit court, ninth circuit, district of California.

PAULINA C. FOWLE
v.
THE CITY OF SACRAMENTO. } No. 1035.

I hereby consent that Winans and Belknap be, and they are hereby, substituted in my place as attorneys for the plaintiff in this action.

San Francisco, Dec. 11, 1872.

F. P. DANN,
Att'y for Pl'ff.

(Endorsed:) Filed 11 Dec., 1872. L. S. B. Sawyer, clerk.

16 *Bill of exceptions.*

In the circuit court of the United States, ninth circuit, in and for the district of California.

PAULINA C. FOWLE
against
THE CITY OF SACRAMENTO.

Be it remembered that, on the 11th and 12th days of December, 1872, this case was tried before the court without the intervention of a jury, both parties in open court waiving a trial by jury, and submitting their evidence to the court.

For the purpose of establishing her case, plaintiff offered in evidence an exemplified copy of a judgment-roll in a certain action in the district court of the 12th judicial district in and for the State of California, in words and figures, as follows:

In the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco.

PAULINA C. FOWLE, PL'FF,
v.
THE CITY OF SACRAMENTO, DEF'T.

The plaintiff herein complains against the said City of Sacra-
17 mento, defendant, and for cause of complaint shows:

That said defendant, the ity of Sacramento, is a corporation

duly created, organized, and existing under and by virtue of the laws of the State of California, and in pursuance thereof, and was and has been such corporation during all the time and at the different periods hereinafter named. That the said plaintiff is the holder and owner of twenty-five (25) certain bonds of said defendant, the City of Sacramento, heretofore duly made, executed, and delivered by the said defendant to one Daniel J. Lisle, and by him, for value received, transferred to plaintiff, which said twenty-five bonds are called "levee bonds," and were so given for money loaned to said city called the "levee loan," and are numbered respectively 1, 5, 6, 7, 8, 9, 10, 22, 37, 39, 40 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54, being each for the principal sum of ($1,000) one thousand dollars, except the said bond No. 22, which is for the principal sum of seven hundred and fifty ($750) dollars, all of which principal sums bear interest at the rate of seven per cent. per annum, payable in semi-annual installments upon the first day of January and July in each year until the whole of said sums, principal and interest, is fully paid.

That the principal sum of each of the said bonds accrued and fell due January 1st, A. D. 1863. That each of said installments of interest thereon, and on the principal sum of the said twenty-five (25) bonds, payable semi-annually as aforesaid, were evidence by coupons or interest-notes therefor, attached to the said bonds respectively.

18 That plaintiff is the holder and owner of one hundred and twenty-five (125) such coupons aforesaid attached to said bonds, to wit, five (5) coupons attached to each of the said 25 bonds, numbered 16, 17, 18, 19, & 20, respectively, being each for the sum of forty dollars, excepting the coupons attached to said bond No. 22, which are for thirty dollars each, and payable on the 1st day of January, 1861, 1st day of July, 1861, 1st day of January, 1862, 1st day of July, 1862, and 1st day of January, 1863, respectively. That all of said 25 bonds are in words and figures alike, and executed in manner and form similar to each other, with the exception of the number thereof, and said bond No. 22 aforesaid. That all of said 125 coupons are in words and figures alike, and executed in manner and form similar to each other, with the exception of the dates of payment and numbers thereof, and the amount of the coupons attached to bond No. 22. That plaintiff has annexed hereto a copy of one of said bonds and coupons, marked Exhibit A, which he prays ma*de* be made a part of this complaint.

That plaintiff is also the owner and holder of eighteen certain due and unpaid coupons or interest-notes of the said defendant, to wit, nine due on bond No. 1010, of funded loan of said def't, for the sum of $9.75 each numbered, 10, 11, 12, 13, 14, 15, 16, 17, 18, respectively, and nine due on bond No. 1011 of funded loan of said def't, for the sum of $5.00 each, and numbered 10, 11, 12, 13, 14, 15, 16, 17, 18, respectively.

That plaintiff has duly demanded payment from said defendant of said bonds and coupons, and of each and all thereof, including

19 the said eighteen coupons hereinbefore last described, as the owner and holder of said bonds and coupons, and has offered to surrender the respective bonds and coupons hereinbefore mentioned, on payment thereof. That the same, to wit, said bonds and coupons, and all of them have not, nor has any of them, or any part thereof, been paid, but payment thereof has been at all times refused by defendants.

That said bonds and coupons, and all and each thereof hereinbefore described, are now past due. That said bonds were issued under and by authority of the charter of the city of Sacramento, and a vote of the people, on the 17 of July, 1852. That defendant is justly indebted to

plaintiff thereon, in the following sums, to wit: on the said twenty-five bonds in the sum of $24,750 principal; on the said one hundred and twenty-five coupons in the sum of $4,950; on the said eighteen coupons last-mentioned in the sum of $132.05; in all, the sum of $29,832.05. That the said sum of $24,750, due on said bonds, bears legal interest from 1st January, 1863. That said 125 coupons amount to said sum of $4,950, and bear legal interest as follows: 25 thereof or $990 from January 1st, 1861; 25 thereof or $990 from July 1st, 1861; 25 thereof or $990 from Jan'y 1st, 1862; 25 thereof or $990 from July 1st, 1862; 25 thereof or $900 from Jan'y 1st, 1863.

That said eighteen coupons amounting to $132.08 bear legal interest as follows: two thereof or $14.75 from July 1st, 1861; two thereof
20 or $14.75 from Jan'y 1st, 1862; two thereof or $14.75 from July 1st, 1862; two thereof or $14.75 from Jan'y 1st, 1863; two thereof, or $14.75 from July 1st, 1863; two thereof or $14.75 from Jan'y 1st, 1864; two thereof or $14.75 from July 1st, 1864; two thereof or $14.75 from Jan'y 1st, 1865; two thereof or $14.75 from July 1st, 1865.

Wherefore plaintiff prays judgment against said defendant, The City of Sacramento, for the said sum of $29,832.05, with interest on the different parts thereof as above set forth, and for costs herein.

WINANS AND BELKNAP,
Pl'ff's Att'ys, San Francisco.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Robert C. Johnson, being duly sworn, says that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, save as to the matters therein stated on information or belief, and as to those matters he believes it to be true. Deponent further says that the plaintiff herein is absent from the city and county of San Francisco, and from the State of California, being in one of the Atlantic States, and deponent represents the agent of plaintiff in this case, which are the reasons this verification is made by deponent and not by said plaintiff.

21 ROBERT C. JOHNSON.

Subscribed and sworn to before me this 10th day of Dec., 1866.
[L. S.] J. T. MILLIKEN,
Notary Public.

22 EXHIBIT A.

No. 1.] CITY OF SACRAMENTO, LEVEE LOAN. [$1,000.

(On margin:) The faith and credit of the city pledged, by authority of the charter of the city of Sacramento, and a vote of the people on the 17th of July, 1852.

The mayor and common council of the city of Sacramento, State of California, are, in their corporate capacity, indebted unto Daniel J. Lisle in the sum of one thousand dollars, which said sum is payable unto said Daniel J. Lisle, or bearer, upon the 1st day of January, A. D. 1863, at the office of the agent of said city of Sacramento, in the city of New York, and bears interest from date, at the rate of eight per cent. per annum, payable on presentation of the several coupons hereunto attached, the first instalment of which interest is payable upon the first day of July, A. D. 1853, and the remainder of which interest is payable in semi-annual instalments upon the first day of January and July of

each and every succeeding year at the office aforesaid, until said principal sum with the interest due thereon is paid. For the payment of which said amounts, both principal and interest, in manner aforesaid, the faith and credit of the city of Sacramento are hereby pledged.

It being, however, hereby expressly covenanted and conditioned that the mayor and common council of said city of Sacramento shall
23 retain to themselves and their successors in office the right and power to call in and redeem this bond at any time on which they may determine prior to the said first day of January, A. D. 1863, upon their first giving ninety days' notice of such intention, and of the time by them appointed, by advertisement in a public journal published in the said city of New York, and that, after the time specified in said notice for the redemption hereof, unless this bond shall have been presented for redemption at the office of the agent of the city of Sacramento in New York, the principal sum herein specified shall cease to draw interest.

Sealed and delivered the eighteenth day of October, A. D. 1852.

THE SEAL OF THE CITY OF SACRAMENTO.

C. J. HUTCHINSON, *Mayor.*
R. CHENERY, *Treasurer.*
WASHINGTON MEEKS,
Secretary of the Common Council.

24 No. 20.] COUPON. [$40.

On the first day of January, 1863, the mayor and common council of the city of Sacramento will pay bearer at the office of the agent of said city, in the c'y of New York, forty dollars, being interest on bond No. 1, of levee loan, from the 1st day of July, 1862, unto the 1st day of January, 1863.

R. CHENERY, *Treasurer.*

In this action the defendant, The City of Sacramento, having been regularly served with process, and having failed to appear and answer the plaintiff' complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises is hereby duly entered according to law.

Attest my hand and the seal of said court this 1st day of March, 1867.

[L. S.]

W'M LOEWY, *Clerk,*
Per G. C. LETCHER, *Deputy Clerk.*

(Endorsed:) Complaint filed December 12, 1866. W'm Loewry, c'k, per G. C. Letcher, D. C.

25 In the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco.

PAULINA C. FOWLE, PLAINTIFF,
v.
THE CITY OF SACRAMENTO, DEFENDANT.

STATE OF CALIFORNIA,
County of Sacramento, City of Sacramento, ss:

Julius Wetzlar, being duly sworn, says that he received the annexed summons on the 15th day of December, A. D. 1866, and personally served

the same on the 15th day of December, A. D. 1866, on the defendant, The City of Sacramento, by delivering to Charles H. Swift, president of the board of trustees of said defendant, personally, in the city of Sacramento, in said county, a copy of said summons attached to a copy of the complaint, certified by the clerk of this court, under the seal thereof, and that he knew the said person served to be the president of the board of trustees and head of said corporation, The City of Sacramento, the defendant mentioned in the within summons, and that he not only delivered to said Swift the said copy, summons, and complaint, but left the same with him. Deponent further saith that he, the deponent,
is (and was, on said 15th day of December, 1866) a white male
26 citizen of the United States, over twenty-one years of age, and competent to be a witness on the trial of this cause.

JULIUS WETZLAR.

Sworn to before me this 15th day of December, 1866.

[L. S.] SAMUEL CROSS,

Notary Public, Sacramento County, California.

27 In the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco.

PAULINA C. FOWLE, PLAINTIFF,
vs.
THE CITY OF SACRAMENTO, DEFENDANT.

Action brought in the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California send greeting to the city of Sacramento, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint. The said action is brought to recover the sum of
$29,832.05, with interest on the different parts thereof as set forth
28 in the complaint, alleged to be due from defendant to plaintiff upon 25 bonds and the interest-notes or coupons attached, said bonds being denominated "levee bonds," and also upon 18 certain coupons, nine thereof due on bond No. 1010 and nine on bond No. 1011 of the funded loan of said defendant, a more particular description of said bonds and coupons being given in the complaint; also for costs of suit. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for said sum of $29,832.05, with interest as aforesaid and costs.

Given under my hand and seal of the district court of the twelfth judicial district of the State of California, in and for the city and county

of San Francisco, this 12th day of December, in the year of our Lord one thousand eight hundred and sixty-six.

[L. S.] W'M LOEWY, *Clerk*,
By G. C. LETCHER, *Deputy Clerk*.

(Endorsed:) Summons and affidavit of service. Filed February 2, 1867. W'm Loewy, clerk, by Paul Neumann, deputy clerk.

[50-ct. int. rev. stamp, canceled, G. C. L., Dec. 12, 1866.]

29 In the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco.

PAULINA C. FOWLE
v.
THE CITY OF SACRAMENTO.

In accordance with a stipulation heretofore filed in this cause, and by order of this court, made and entered herein on the 16th day of February, 1867, the complaint in this cause is hereby amended as follows:

On line 23, page 5, strike out the words "legal interest," and insert instead thereof, "interest at the rate of eight per cent. per annum."

On line 27, page 5, strike out the words "legal interest," and insert instead thereof, "interest at the rate of eight per cent. per annum."

On line 8, page 6, strike out the words "legal interest," and insert instead thereof, "interest at the rate of eight per cent. per annum."

WINANS AND BELKNAP,
Pl'ff's Att'ys.

(Endorsed:) Amendm't to complaint. Filed Feb'y 27, 1867. W'm Loewy, Cl'k, by Octavius Bell, D. C.

30 In the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco.

PAULINA C. FOWLE
v.
THE CITY OF SACRAMENTO. } No. 13116.

In this action the default of the defendant having been regularly entered, upon motion of D. P. Belknap, esquire, one of the attorneys for the plaintiff, it is ordered by the court that judgment be entered herein in favor of said plaintiff and against said defendant for the sum of $40,100.64, with interest thereon at the rate of eight per cent. per annum, as stipulated between the parties, and costs: Now, therefore, by virtue of the law and by reason of the premises and order aforesaid, it is ordered, adjudged, and decreed that Paulina C. Fowle, plaintiff, do have and recover from The City of Sacramento, defendant, the sum of forty thousand one hundred and $\frac{64}{100}$ dollars ($40,100.64,) with interest thereon at the rate of eight per cent. per annum, from the 8th day of March, A. D. 1867, till paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of sixteen and $\frac{50}{100}$ dollars, ($16.50.)

Judgment recorded March 26, A. D. 1867.

(Endorsed:) Judgment-roll. Filed March 26, 1867. W'm Loewy, clerk, by Octavius Bell, deputy clerk.

31 I, William Harney, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the twelfth district court, in and for said city and county, hereby certify the foregoing to be a full and true copy of the original judgment-roll in the above-entitled action, filed in my office on the 26th day of March, A. D. 1867.

Attest my hand and seal of said court this 2nd day of December, A. D. 1872.

[L. S.] WILLIAM HARNEY, *Clerk.*
By J. D. RUGGLES, *Deputy Clerk.*

32 In the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco.

PAULINA C. FOWLE, PLAINTIFF,
v.
THE CITY OF SACRAMENTO, DEFENDANT. } No. 13116.

I, William Harney, county clerk of the city and county of San Francisco, and ex-officio clerk of the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, State of California, do hereby certify the foregoing to be a full, true, and correct copy of the original judgment-roll on file and of record in my office in the above-entitled cause; that the same constitutes a full and complete exemplification of the judgment-roll in the said cause and of the whole thereof. All which I have caused to be exemplified according to the act of Congress.

In witness whereof I have hereunto set my hand and affixed the seal of said court this ninth day of December, A. D. 1872.

[L. S.] WILLIAM HARNEY,
County Clerk.

I, E. W. McKinstry, sole judge of the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco, do hereby certify that said court is a court of record,
33 having a clerk and seal; that William Harney, who has signed the annexed attestation, is the duly elected and qualified county clerk of the city and county of San Francisco, and was, at the time of signing said attestation, ex-officio clerk of said district court; that said signature is his genuine handwriting, and that all his official acts as such clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.
Witness my hand this ninth day of December, A. D. 1872.

(S'g'd) E. W. McKINSTRY,
Judge of the District Court of the 12th Judicial District of the State of California, in and for the City and County of San Francisco.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, William Harney, county clerk of the city and county of San Francisco, and ex-officio clerk of the district court of the 12th judicial district, in and for the city and county of San Francisco, State of California, do hereby certify that the honorable E. W. McKinstry, whose name is

subscribed to the preceding certificate, as sole judge of the district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco, duly elected and qualified, and that the signature of said judge to said certificate is genuine.

In witness whereof I have hereunto set my hand and affixed
34 the seal of the said court this ninth day of December, A. D. 1872.

[L. S.] WILLIAM HARNEY,
County Clerk.

The defendant then and there, by counsel, admitted that plaintiff, on the 18th day of March, 1872, in open session of the board of trustees of defendant, in due form of law, presented her claim as set out in her complaint, filed herein, to said board of trustees, accompanied by a proper demand for the payment of the same, and the said board then and there refused to pay, and rejected the same. And thereupon defendant, by counsel, objected to the admission of said judgment-roll, and the several parts thereof, as evidence, on the following grounds, to wit:

1. Because it does not appear that the defendant was ever served with process or summons in the said case in 12th district court.

2. Because it appears from said roll that the said defendant was not served with summons, as required by statute, the president of the board of trustees not being the president of defendant.

3. Because the subject-matter of the complaint set out in such judgment-roll shows that no judgment could be lawfully rendered in said case, the same having accrued prior to the date of the passage of the act constituting the charter of defendant, on the 25th day of April, 1863, and because it is provided in said charter that no action shall be maintained against defendant for or on account of any bond, covenant,
35 agreement, contract, matter, or thing not made or entered into by defendant after the 25th day of April, 1863.

4. Because it appears from said roll that the plaintiff recovered judgment for interest upon the interest due on said bonds.

The court overruled the said several objections, and admitted the said roll in evidence, and the defendant then and there, by counsel, excepted.

Plaintiff thereupon rested her case.

And the defendant offered in evidence the charter of the defendant, passed April 25, 1863, the first section of which is herein introduced, not as thereby giving a greater effect thereto in this bill of exceptions than to the other acts of the legislature of said State, or parts of said acts hereinbefore referred to and introduced, and not expressly copied herein, but for greater convenience of reference, and is as follows:

Section 1. For the purpose of municipally governing that portion of the county of Sacramento lying within the following-described limits, that is to say: Beginning at the junction of the centre of the old channel of the American River with the centre of the old channel of the Sacramento, and running thence down the centre of the channel of the Sacramento River to a point opposite the south line of Y street, as laid down on the official map or plan of Sacramento City on file in the recorder's office of the county of Sacramento, and thence easterly in a straight line, and along the south line of Y street to the east line of Thirty-first street, as laid down on said map, and thence northerly along the east line of Thirty-first street, and an extension thereof, to the centre of the
36 channel of the American River, and thence down the centre of the old channel of the American River to the place of beginning. The inhabitants thereof are hereby made and constituted a body

politic and corporate, under the name and style of the "City of Sacramento," by which name they shall be known in law, shall have perpetual succession, may make, break, alter, renew, and have a common seal, may sue or be sued, and defend, upon any bond, covenant, agreement, contract, matter, or thing whatever, of which the courts of law or equity have jurisdiction; Provided, however, that such bond, covenant, agreement, contract, matter, or thing that is the cause of action has been made or entered into after April twenty-fifth, eighteen hundred and sixty-three: but provided further, that this cause shall not prevent said city from commencing and maintaining any action for the recovery of any taxes or license-moneys that have heretofore accrued within the limits aforesaid fer municipal purposes; and provided further, that no action shall be commenced or maintained against the city until the claim, account, or demand upon which it is founded has been presented to, and either in whole or in part been rejected by, the board of trustees; and provided further, that none of the lands, tenements, hereditaments, appurtenances, taxes, revenue, franchises, actions, choses in action, property, or effects of any kind or nature whatsoever of said city, or of either or any of its trusts or uses, shall be attached, levied upon, or sold in any process whatsoever, either original, mesne, or final; and said city may, under the restrictions and limitations in this act contained, purchase, or receive by legacy or donation, and hold real estate
37 and personal property, either for its own use or in trust for public schools, or for a house of refuge, or a reform school, or an orphan asylum, or the fire department; and it may do and perform all such other matters and things, and exercise all such other powers, and enjoy all such rights, privileges, franchises, liberties, and immunities, and shall be subject to all such restrictions and limitations, as are or may be by this or any other law granted or prohibited to it; and the lands, tenements, hereditaments, appurtenances, moneys, taxes, assessments, liens, revenues, franchises, actions, choses in action, chattels, rights, claims, property, effects, aad trusts, which, on the thirtieth day of April, eighteen hundred and fifty-eight, were vested in, belonging to, or held by "The mayor and common council of the city of Sacramento," and the lands, tenements, hereditaments, appurtenances, moneys, taxes, assessments, liens, revenues, franchises, actions, choses in action, chattels, rights, claims, property, effects, and trusts, which, since the said thirtieth of April, eighteen hundred and fifty-eight, have arisen or accrued, or been derived or acquired within the above-described city limits for municipal purposes, or with municipal funds, are hereby transferred to, vested in, made the property of, and declared and determined to belong to and to be held by "The City of Sacramento."

Plaintiff thereupon admitted that said act of April 25, 1863, was and is the act by which the defendant now stands incorporated.

The defendant thereupon offered to prove by D. P. Belknap, esq., that he was the attorney for plaintiff in said case in the district court of the 12th judicial district, and that no other or further service of
38 summons or process was had in said case than as set out in the affidavit of Julius Wetzlar.

The plaintiff, by counsel, objected that no oral evidence could be admitted to contradict, vary, or explain judgment-roll; and further that said evidence was irrelavent.

The court sustained the objection, and ruled out the offered evidence, and defendant duly then and there excepted.

Defendant here rested its case, and plaintiff offered in evidence the act of March 26, 1851, incorporating defendant, and the act of April 24,

1858, consolidating the city and county of Sacramento; and it was then and there agreed by the said parties that the said two several acts of the legislature of the State of California, together with the said act of April 25, 1863, should be regarded as in evidence in this case; that each was and is a public act, of which the appellate court may take judicial notice without proof, and that on the trial of this case in this court, or on appeal, or writ of error, the said several acts shall be deemed public laws of the said State; and, on the appeal in this case, shall be read before the appellate court from the printed copies in volumes of the statutes of the State of California for the years 1851, 1858, and 1863, respectively, purporting to have been printed by the State printer of said State; said act of March 28, 1851, extending from page 391 to page 401, inclusive, of said printed statutes of 1851; said act of April 24, 1858, extending from page 267 to page 289, inclusive, of said printed statutes of 1858; and said act of April 25, 1863, extending from page 415 to page 441, inclusive, of said printed statutes of 1863, and each of said
39 acts, and every or any part thereof which counsel for plaintiff or defendant may desire to read in evidence, shall constitute a part, and be so read as a part, of this bill of exceptions, with the same force and effect as if herein expressly inserted and set forth in detail.

The defendant thereupon admitted that the bonds described in said complaint, in said 12th district court, were duly and lawfully issued as therein stated, and in good faith, and for the consideration therein named, under and pursuant to the charter of said city, passed March 26, 1851.

In testimony whereof, and for the purpose of authenticating the truth of the several matters in this bill of exceptions contained, I, Lorenzo Sawyer, circuit judge, before whom said case was tried, have signed and sealed the same, making it a part of the record in this case, this 5th day of February, 1873.

(S'g'd) LORENZO SAWYER, [SEAL.]
Circuit Judge, Ninth Circuit.

(Endorsed:) Filed 6th Feb., 1873. L. S. B. Sawyer, clerk.

40 *Bond on writ of error.*

Supreme Court of the United States.

THE CITY OF SACRAMENTO, PLAINTIFF IN ERROR,
v.
PAULINE C. FOWLE, DEFENDANT IN ERROR.

Know all men by these presents that we, the City of Sacramento, Samuel Poorman, and John Rider, of the city of Sacramento, State of California, are held and firmly bound unto Pauline C. Fowle, of the city of New York, State of New York, in the sum of three hundred (300) dollars, to be paid to the said Pauline C. Fowle, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this first day of April, 1873.

Whereas the above-named City of Sacramento hath prosecuted a writ of error to the Supreme Court of the United States, from the circuit court of the United States for the district of California, to reverse the judgment rendered in the above-entitled action by the circuit court of

the United States for the district of California: Now, therefore, the condition of this obligation is such, that if the above-named City of Sacramento shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation
41 shall be void; otherwise to remain in full force and virtue.

THE CITY OF SACRAMENTO, [SEAL.]
By CHRISTOPHER GREEN,
President of its Board of Trustees.
JOHN RIDER. [SEAL.]
SAMUEL POORMAN. [SEAL.]

Sealed and delivered in presence of—
EDW. CADWALDER.
H. K. TERRY.

STATE OF CALIFORNIA,
County of Sacramento, ss:

Samuel Poorman and John Rider, after being duly sworn, each for himself says, that he is a citizen of the United States, and a resident and freeholder within the State of California, and is worth the sum specified in the foregoing bond, over and above all his just debts and legal liabilities.

JOHN RIDER. [SEAL.]
SAMUEL POORMAN. [SEAL.]

Subscribed and sworn to before me this 1st day of April, A. D. 1873.
[L. S.] EDW. CADWALDER,
U. S. Commissioner at Sacramento, State of California.

(Endorsed:) Form of the within bond and the sufficiency of the sureties thereon are approved this 9th day of April, 1873.
(S'g'd) LORENZO SAWYER,
Circuit Judge.

Filed April 9, A. D. 1873.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

42 UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, in the ninth judicial circuit, do hereby certify that the foregoing forty-one written pages, numbered from 1 to 41, both inclusive, are a full and true copy of the record and all the proceedings in the therein-entitled cause, and that the same, together, constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court, this 17th day of May, A. D. 1873.
[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsement on cover:) No. 464. The City of Sacramento, plaintiff in error, vs. Paulina C. Fowle. California C. C. U. S. Filed 8th August, 1873.

REC. 464—2

Supreme Court of the United States.

THE CITY OF SACRAMENTO, PLAINTIFF IN ERROR,
v.
PAULINA C. FOWLE, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

Defendant in error, being the owner of certain bonds of the City of Sacramento, on the 12th day of December, 1866, commenced her suit against said city in the District Court of the Twelfth Judicial District, State of California, to obtain judgment for the amount of the bonds and coupons.

The bonds were issued in October, 1852.

Summons was served by delivering to the President of the Board of Trustees of said city a copy of the summons, annexed to a certified copy of the complaint. (Pages 10 and 11 of the record.)

The plaintiff in error is organized under and by Act of the Legislature of said State, passed April 25th, 1863. The defendant in error had judgment in said Twelfth District Court, on the 26th day of March, 1867. (Folio 30.)

March 26th, 1872, the said Paulina commenced her action in the Circuit Court for California, to obtain judgment in the nature of a renewal of the judgment in the Twelfth District Court, and against a judgment for plaintiff in that action, the defendant prosecutes its writ of error.

I.

The Circuit Court erred in admitting in evidence the judgment roll against objections. (Folio 34, p. 14.)

(*a*) The summons from the Twelfth District Court was not properly served.

The California Practice Act (sec. 29) provided that if the suit be against a corporation, the summons shall be served by delivering a copy thereof to the "president, or

other head of the corporation, secretary, cashier, or managing agent thereof."

The powers of the President of the Board of Trustees are prescribed in Section 5 of the charter. (Acts 1863, p. 419.) The President of the Board of Trustees must have been, at the time, either, *first*—President of the corporation; or, *second*—other head of it; or, *third*—a managing agent thereof, or he was not the proper party on whom to serve the summons.

The President of the Board of Trustees was not the president of the corporation; the corporation had no president, and there was no "head" to the corporation, within the meaning of that word, as used in the statute, except the Board of Trustees sitting as such; each officer had distinct duties prescribed for him in the charter, Article II, secs. 3 to 16, and each was head of his distinct department.

(*b*) Nor was the President of the Board of Trustees a "manging agent" of plaintiff in error. He had certain prescribed duties to perform; within those, he was a managing agent, but to constitute him a managing agent for the purpose of service of summons, the statute contemplates an agency extending to all the concerns of the corporation. (*Brewster* v. *M. I. C. R. R. Co.* 5 Howard Pr. 183; *Upper Mi. T. Co.* v. *Whitaker*, 16 Wis. 220; *Parke* v. *C. I. Co.* 44 Pa. 422.)

(*c*) The judgment in the Twelfth District Court recites that "the default of the defendant having been regularly entered," and it fails to recite that summons was duly served, (folio 30, p. 12), and the case, therefore, does not fall within the rule in *Hahn* v. *Kelly*, 34 Cal. 391.

The summons not having been served on the defendant, as provided by statute, the default of the defendant, in the Twelfth District Court, was irregularly entered, and the judgment was void. (*Galpin* v. *Page*, October Term of this Court, 1873, unreported.)

(*d*) The plaintiff in error offered to prove in the Circuit Court, that no other or further service of summons from the Twelfth District Court was had, than as stated in the affidavit of Julius Wetzlar. (Folios 37–38.) This is assigned as error. (*J. J. Thompson* v. *John Whitman*, October Term of this Court, 1873, unreported.)

II.

The charter of defendant, (Acts of 1863, of California, p. 415, see folio 36, p. 14), provides that the City of Sacramento may be sued by its name on any bond, "*provided*, however, that such bond, * * that is, the cause of action, has been made or entered into after April 25th, 1863." The bonds in question were of an earlier date. The provision quoted was intended to prohibit actions against the city for causes existing or arising before that date.

At the time of the commencement of the action in the Twelfth District Court, the City of Sacramento was so constituted that it was not liable to the action.

(*a*) By the Constitution of California, Section 31, Article IV, it is provided that all general laws and special Acts, passed pursuant to that section, may be altered from time to time or repealed. There is, therefore, no constitutional objection to the clause of the charter invoked as a protection by the city.

The bond holders took, subject to the contingency, that the charter might be so altered that they must look to payment of their claims without action against the city.

(*b*) A municipal corporation cannot be sued except as allowed by statute. (*Mitchell* v. *City of Rockland*, 52 Me. 118; *Sharp* v. *County of Contra Costa*, 34 Cal. 284; *Hunsocker* v. *Borden*, 5 Cal. 289; *Dillon on M. C.* 1*st Ed.* Sec. 30, p. 72, and note; *Webster* v. *Reid*, 11 Howard, 437–456.)

(*c*) And the statute prohibiting suits against the city cannot be waived by the parties. (*Armstrong* v. *Toler*,

11 Wheaton, 258; *Barton et al.* v. *P. J. & U. F. P. R. Co.* 17 Barb. 397; *City of O.* v. *Carpentier*, 13 Cal. 540; *Zottman* v. *City of S. F.* 20 Cal. 96.)

(*d*) The charter of the City of Sacramento, Section 26, Acts of 1863, p. 426, provides for the payment of the bonds in question, setting aside fifty-five per cent of the revenue derived from taxes, licenses, harbor dues, net water rents, and fines collected in the Police Court. To this source must the holders of the bonds look for payment.

(*e*) The only effect of a judgment must be to increase the amount due by adding costs with interest upon interest The property of the city cannot be sold under execution, nor can the property of its citizens be sold to satisfy any judgment in the case.

The remedy is by mandate to compel the levy of a tax to raise the necessary means of payment. (*Crane* v. *Fond du Lac*, 16 Wis. 196, *Chicago* v. *Halsey*, 25 Ills. 595, *Com.* v. *Alleghany Co.* 37 Pa. St. R. 277 and 290, *Com.* v. *Perkins*, 43 Pa. St. R. 400, *State* v. *Milwaukee*, 20 Wis. 87, *State* v. *Beloit*, 20 Wis. 79.)

III.

The plaintiff in error is not estopped by the judgment in the Twelfth District Court from urging and maintaining its defense to the action reasserting the right of the said Paulina to recover a judgment on her bonds against it, because the judgment on its face shows its void character. (*Borden* v. *Fitch*, 15 Johns. 145; *Higgins* v. *Reltzer*, 49 Mo. 152; *Bauer* v. *Bauer*, 40 Mo. 61; *Morse* v. *Toppan*, 3 Gray, 411; *Loring* v. *Folger*, 7 Gray, 505; *Fithran* v. *Monks*, 43 Mo. 502, 515; *Watkins* v. *Abrahams*, 24 N. Y. 72; *Coon* v. *Brook*, 21 Barb. 549; *Kilburn* v. *Woodworth*, 5 Johns. 37; *Webster* v. *Reed*, 11 How. U. S. 437, 456.)

The judgment of the Circuit Court should be reversed and the case dismissed.

DELOS LAKE,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE U. S.

THE CITY OF SACRAMENTO, Plaintiff in Error,
vs.
PAULINA C. FOWLE, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Defendant in error, being the owner of certain bonds of the City of Sacramento, on the 12th day of December, 1866, commenced her suit against said city in the District Court of the Twelfth Judicial District, State of California, to obtain judgment for the amount of the bonds and coupons.

The bonds were issued in October, 1852.

Summons were served by delivering to the President of the Board of Trustees of said city a copy of the summons, annexed to a certified copy of the complaint. (Pages 10 and 11 of the record.)

The plaintiff in error is organized under and by Act of the Legislature of said State, passed April 25th, 1863. The defendant in error had judgment in said Twelfth District Court, on the 26th day of March, 1867. (Folio 30.)

March 26th, 1872, the said Paulina commenced her action in the Circuit Court for California, to obtain judgment in the nature of a renewal of the judgment in the Twelfth District Court, and against a judgment for plaintiff in that action, the defendant prosecutes its writ of error.

I.

The Circuit Court erred in admitting in evidence the judgment roll against objections. (Folio 34, p. 14.)

(*a*) The summons from the Twelfth District Court was not properly served.

The California Practice Act (sec. 29) provided that if the suit be against a corporation, the summons shall be served by delivering a copy thereof to the "president, or other head of the corporation, secretary, cashier, or managing agent thereof."

The powers of the President of the Board of Trustees are prescribed in Section 5 of the charter. (Acts 1863, p. 419.) The President of the Board of Trustees must have been, at the time, either, *first*—President of the corporation; or, *second*, other head of it; or, *third*—a managing agent thereof, or he was not the proper party on whom to serve the summons.

The President of the Board of Trustees was not the President of the corporation; the corporation had no President, and there was no "head" to the corporation, within the meaning of that word, as used in the statute, except the Board of Trustees sitting as such; each officer had distinct duties prescribed for him in the charter, Article II, secs. 3 to 16, and each was head of his distinct department.

(*b*) Nor was the President of the Board of Trustees a "managing agent" of plaintiff in error. He had certain prescribed duties to perform; within those, he was a managing agent, but to constitute him a managing agent for the purpose of service of summons, the statute contemplates an agency extending to all the concerns of the corporation. (Brewster *v.* M. I. C. R. R. Co., 5 Howard Pr. 183; Upper Mi. T. Co. *v.* Whitaker, 16 Wis., 220; Parke *v.* C. I. Co., 44 Pa., 422.)

(*c*) The judgment in the Twelfth District Court recites that "the default of the defendant having been regularly entered," and it fails to recite that summons was duly

served, (folio 30, p. 12,) and the case, therefore, does not fall within the rule in Hahn *v.* Kelly, 34 Cal., 391.

The summons not having been served on the defendant, as provided by statute, the default of the defendant, in the Twelfth District Court, was irregularly entered, and the judgment was void. (Galpin *v.* Page, 18 Wall., 350.)

(*d*) The plaintiff in error offered to prove in the Circuit Court, that no other or further service of summons from the Twelfth District Court was had, than as stated in the affidavit of Julius Wetzlar. (Folios 37—38.) This is assigned as error. (J. J. Thompson *v.* John Whitman, 18 Wall., 457.)

II.

The charter of defendant, (Acts of 1863 of California, p. 415, see folio 36, p. 14,) provides that the City of Sacramento may be sued by its name on any bond, "*provided*, however, that such bond, * * that is, the cause of action, has been made or entered into after April 25th, 1863." The bonds in question were of an earlier date. The provision quoted was intended to prohibit actions against the city for causes existing or arising before that date.

At the time of the commencement of the action in the Twelfth District Court, the City of Sacramento was so constituted that it was not liable to the action.

(*a*) By the Constitution of California, Section 31, Article IV, it is provided that all general laws and special acts, passed pursuant to that section, may be altered from time to time or repealed. There is, therefore, no constitutional objection to the clause of the charter invoked as a protection by the city.

The bondholders took, subject to the contingency, that the charter might be so altered that they must look to payment of their claims without action against the city.

(*b*) A municipal corporation cannot be sued except as allowed by statute. (Mitchell *v.* City of Rockland, 52 Me., 118; Sharp *v.* County of Contra Costa, 34 Cal., 284; Hunsocker *v.* Borden, 5 Cal., 289; Dillon on M. C. 1st Ed. Sec. 30, p. 72, and note; Webster *v.* Reid, 11 Howard, 437—456.)

In Mitchell *v.* City of Rockland, the court says: (p. 123) "As a general rule municipal corporations are not liable to a suit except when the right of action is given by statute." In Mower against the inhabitants of Leicester, (7 Mass. p. 250,) the court says: "But *quasi* corporations created by the legislature for purposes of public policy are subject by the common law to indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute."

In Sharp *v.* The County of Contra Costa, the court says: (34 Cal., 290,) "In this case a sovereign is one of the contracting parties for the government of the county of Contra Costa is a portion of the State government, and as against a sovereign there are no remedies except such as the sovereign in the exercise of that good faith by which all governments are presumed to be actuated may accord." Citing in support of that doctrine Hunsocker *v.* Borden, 5 Cal., 290; McCauley *v.* Brooks, 16 Cal., 34.

In the people *v.* Doe G. *et al.* (36 Cal., 221,) the assessor had levied a tax on the property of plaintiff in error. Suit was brought against the land taxed and the owners, and judgment was entered directing a sale of the land. A sale was had, and one Eli Mayo purchased, and after he obtained his deed he applied for a writ of assistance to put him in possession of a part of the city cemetery. The court says, p. 223, in rendering judgment: "Neither the State in its own person, or as represented in its local subordinate governments can be summoned to answer before its courts except by its own consent"—citing Sharp *v.* Contra Costa Co.

The case of Webster *v.* Reid, though not precisely in point, may be read in illustration of the idea that this court will look into the record, and if from the whole case it is disclosed, the original judgment was a nullity, the fact of its rendition gives it no force, and it will in such case be treated as void.

The charter of plaintiff in error substantially provides that it cannot be sued in respect of the bonds in question, and the facts appear in the complaint offered in evidence. It is then a case where the complaint fails to state a cause of action; or, in other words, it states a fact which, when considered in the light of the charter of plaintiff in error, shows that no cause of action existed. Out of such a state of facts a cause of action cannot arise.

(*c*) And the statute prohibiting suits against the city cannot be waived by the parties. (Armstrong *v.* Toler, 11 Wheaton, 258; Barton *et al. v.* P. J. & U. F. P. R. Co 17 Barb., 397; City of O. *v.* Carpentier, 13 Cal., 540; Zottman *v.* City of S. F. 20 Cal., 96.)

In Armstrong *v.* Toler, the doctrine is recognized that no action can be maintained upon a contract growing out of an immoral or illegal transaction. (See cases referred to in note (*a*) p. 265.)

The court says: (p. 271,) "That no action can be maintained on a contract the consideration of which is either wicked in itself or ***prohibited by law.***" In this case the circuit court rendered a judgment against the plaintiff in error upon a supposed cause of action, when the original judgment rendered was prohibited by the charter of the city and thus comes within the rule.

In Barton *v.* P. J. & U. F. P. R. R. Co., the directors of defendant were prohibited from being concerned in any contract for making or working a road. One of the directors violated that prohibition. The court held that

although the penalty of nullity was not prescribed by the act, yet, "every act done against a prohibitory statute is not only illegal but absolutely void, and the court cannot assist an illegal transaction in any respect, or permit it to be set up as a protection." (p. 404.)

See Nellis *v.* Clark, 4 Hill, 424.
Hook *v.* Gray, 6 Barb., 398.
Pennington *v.* Townsend, 7 Wend., 276.

In which latter case it is held that a foreign incorporated banking company which violated the restraining act could not recover the amount of a check discounted by it, the court remarking that "any contract founded on an unlawful act, whether it be *malum prohibitum* or *malum in se*, cannot be enforced by action." And so we say the original judgment in the district court of the 12th district being entered in direct violation of the provision of the charter of the then defendant, and that fact appearing on the face of the judgment roll, it cannot be enforced in any action.

In 17 Barb., 405, the court says: "It is true that a party may waive a statutory proceeding for his own benefit —as for instance notice made preliminary to an ejectment. I have yet to find a case where directors, or even the stockholders of a corporation may waive the provisions of a *prohibitory statute* enacted for good reasons, expressly forbidding the directors of a company from participating in the benefits of a contract for building the road." And so we say here, the corporation could not by acquiesence or direct consent waive the right to object to the entry of a judgment prohibited by statute for good and sufficient reasons.

In Carpentier *v.* City of Oakland the court held that certain acts of plaintiff were fraudulent, and that the defendant could not ratify the fraud by a subsequent board of trustees fraudulently elected by defendant's efforts.

We suppose the same rule would prevail whether the act done was a fraud or mistake of fact or law. The municipal government of Sacramento could not by neglect or consent allow a judgment to go against it, carrying with it a train of evil consequences, and bind thereby the after action of the corporation.

In Zottman *v.* San Francisco, it is held that the corporation cannot ratify an act it was not authorized by its charter to do.

(*d*) The charter of the City of Sacramento, Section 26, Acts of 1863, p. 426, provides for the payment of the bonds in question, setting aside fifty-five per cent. of the revenue derived from taxes, licenses, harbor dues, net water rents, and fines collected in the police court. To this source must the holders of the bonds look for payment.

(*e*) The only effect of a judgment must be to increase the amount due by adding costs with interests upon interest. The property of the city cannot be sold under execution, nor can the property of its citizens be sold to satisfy any judgment in the case.

The remedy is by mandate to compel the levy of a tax to raise the necessary means of payment. (Crane *v.* Fond du Lac, 16 Wis., 196; Chicago *v.* Halsey, 25 Ills., 595; Com. *v.* Alleghany Co., 37 Pa., St. R., 277 and 290; Com. *v.* Perkins, 43 Pa. St. R., 400; State *v.* Milwaukee, 20 Wis., 87; State *v.* Beloit, 20 Wis., 79.)

III.

The plaintiff in error is not estopped by the judgment in the Twelfth District Court from urging and maintaining its defense to the action reasserting the right of the said Paulina to recover a judgement on her bonds against it, because the judgment on its face shows its void character. (Higgins *v.* Peltzer, 49 Mo., 152; Bauer *v.* Bauer, 40 Mo.,

61; Morse *v.* Toppan, 3 Gray, 411; Loring *v.* Folger, 7 Gray, 505; Fithian *v.* Monks, 43 Mo., 502, 515; Watkins *v.* Abrahams, 24 N. Y. 72; Coon *v.* Brook, 21 Barb., 549; Kilburn *v.* Woodsworth, 5 John., 37; Webster *v.* Reed, 11 How., U. S. 437, 456.)

In Bauer *v.* Bauer a judgment passed against a married woman. Held irregular if not void; and without appeal the land court in which the judgment of the justice of the peace was filed stayed execution.

In Fithian *v.* Monks, Mrs. Fithian, a married woman, suffered judgment against her, and under it her real estate was sold. The court rendering judgment had jurisdiction of her person and of that class of cases; but she as a married woman was not by law liable in such cases to have judgment entered against her. She sued in ejectment for the land sold, and if the judgment under which the sale was effected was void by reason of her coverture, she was entitled to recover.

The court says, (p. 522,) "jurisdiction of the cause is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists. It is plain that the government of this State conferred no jurisdiction on the circuit court * * to render a personal judgment over against Mrs. Fithian who was not a mortgagor. It must be considered as an inadvertant assumption of judicial power not granted by law."

(*r*) In Higgins *v.* Peltzer, it was held that a judgment against a married woman was not voidable merely, but void by reason of her coverture.

We do not find any case where a disability or incapacity in a municipal corporation to be sued in respect of a certain subject matter, has been passed upon by a court where a judgment has been rendered against it, by default or otherwise. But we submit that the rule in Higgins *v.*

Peltzer, will apply in such cases. The plaintiff in error by the terms of the act creating it, could not be sued in respect of these bonds.

In case of a married woman so disabled or incapacitated, the judgment would be void, and we insist that this case falls within the rule in Fithian *v.* Monks, and Higgins *v.* Peltzer.

And in Mason *v.* Morse it was held that a judgment against a married woman is void, even though founded on a contract made by her in carrying on business on her own account, and while living separate from her husband.

In Watkins *v.* Abrams *et ux.* it is held that a confession of judgment by a married woman is void, although the consideration be money borrowed for and applied to the improvement of her separate estate.

IV.

The said district court of the 12th judicial district by the complaint of Paulina C. Fowle, filed in it December 12, 1866—(see folios 16 to 24, Record,) did not acquire jurisdiction over the subject matter so as to enable it to render a valid judgment thereon.

(*a*) This court in U. S. *v.* Arredondo, (6 Pet., 709,) says: "The power to hear and determine a cause is jurisdiction. * * Whenever a case is presented which brings this power into action, if the petitioner states such a case in his petition that on demurrer the court would render judgment in his favor it is an undoubted case of jurisdiction." The converse of this proposition is equally sound. If the complaint do not state such a case the court has not jurisdiction.

Let that complaint be so tested, and by the very terms of the charter of Sacramento it was not liable in such action, and a general demurrer would have been sustained.

The court then had not jurisdiction to render judgment for plaintiff, and the objection made by plaintiff in error to the admission of such judgment in evidence should have been sustained.

(*b*) In Fisher *v.* Harnden, (1 Paine's C. C. Report, p. 55, the case was such in October, 1873, a judgment was entered in the supreme court of New York forfeiting all the estate of Donald Fisher to the people of the State of New York. The judgment was contrary to the treaty of peace between Great Britain and the United States of September 3, 1783. One question before the court was whether the validity or invalidity of the judgment could be determined in a collateral way.

The court (pr. Livingston, J.) says: "In the present case it cannot be pretended that the supreme court had any authority to pronounce the judgment which is relied on as forfeiting the property claimed in this action. * * * If this act (allowing the forfeiture) were not in force at the time of its rendition, it must have been *coram non judice* and absolutely void."

In this case, if at the time the judgment was rendered in the twelfth district court, the charter of the city of Sacramento prohibited the rendition of such a judgment, it was *coram non judice* and absolutely void.

For the foregoing reasons the judgment of the circuit court should be reversed and the case be dismissed.

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and J. H. McKUNE,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

THE CITY OF SACRAMENTO.

PLAINTIFF IN ERROR.

vs.

PAULINA C. FOWLE.

DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

I.

Legal notice of the commencement of the original action, Fowle *vs.* City of Sacramento, was given.

a. If the case, Hahn *vs.* Kelly, 34 Cal. 391, is to be taken as stating the true rule as applied to judgments in California, then the record of the judgment in the Twelfth District Court of California is conclusive. That judgment states (page 24 of printed record) that the "City of Sacramento *having been regularly served with process*, etc.," failed to appear. See Hahn *vs.* Kelly, 34 Cal. pp. 419 and 426.

b. Whatever rule is accepted as to the right of the defendant in the original judgment to impeach it collaterally for want of notice, there is no exception to the rule that the judgment of a superior court is presumed to be correct; and that the party seeking to impeach it must prove, or offer to prove, all that is necessary to show the notice defective. The plaintiff in error failed to do this.

The California Process Act, (Compiled Laws of California, Section 29, page 523,) provides that in suits against a cor-

poration, the copy shall be delivered to the "president or other head of the corporation, secretary, cashier, or managing agent thereof."

The original judgment shows that this provision was complied with. The return of service (page 25 of record) shows that the copy was delivered to "Charles H. Swift, *President* of the Board of Trustees of said defendant, and that he knew the said person served to be the *president* of the Board of Trustees and *head of said corporation*." If either allegation of the record that said Swift was *president* or that he was *head of said corporation* is true, then the service was in due form.

The defendant in error was therefore bound to negative both allegations and to prove or to offer to prove both that said Swift was *not president*, and that he was not *head of the corporation*. He did neither.

The sole offer of evidence is in these words (page 38 of record). "The defendent, thereupon offered to prove, etc. etc., and that no other or further service of summons or process was had in said case than as set out in the affidavit of Julius Witzlar." This was objected to as irrelevant, and was properly excluded. That affidavit or return of service shows that the summons and copy were delivered to Charles H. Swift, who *was president*, and was also head of the *corporation*. If the defendent had offered to show that he was not *head of the corporation*, this might have been a question into which the Circuit Court would have inquired; but as the defendant could not produce this evidence, his offer of evidence was irrelevant and insufficient.

The examination of the sufficiency of service upon said Swift as *president* leads to the same result.

The service was upon said Swift, President of the Board of Trustees of said defendant.

Was said Swift president of the defendant corporation, within the meaning of the process act above cited?

The charter of the city referred to in the record, Statutes of California, 1843, page 416, is as follows:

Section 2. "The City of Sacramento shall be *governed* by a Board of Trustees consisting of Three Members."

Section 3. "The officers of The City of Sacramento shall be a First, Second and Third Trustee who shall constitute a Board of Trustees."

Section 4. "The Board of Trustees shall be designated as follows: The First Trustee shall be President of the Board of Trustees and *general executive officer of the City Government.*"

Section 5. "The President of the Board of Trustees shall be the head of the police *and general executive head of the city.*"

No Mayor or other executive or head officer is named in the charter.

The President of the Trustees is therefore the president of the corporation, and is also "*head*" of the corporation and "managing agent" thereof.

The evidence offered that the service recited in the record was the only service, was irrelevant for the reason that this service was in exact accordance with the statutes of California.

It showed service upon the *President* of the corporation, upon the *head* of the corporation, and upon the *managing agent* thereof.

III.

The question as to the original liability of the city upon the bonds declared upon in the original suit is immaterial. Whatever defence they had to make should have been made then. It is now too late.

H. F. DURANT,

For Defendant in Error.